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**VIA ELECTRONIC FILING**

The Honorable Anita Brody  
United States District Court Judge  
U.S. Courthouse, Room 7613  
601 Market Street  
Philadelphia, PA 19106-1717

**RE: *Brown et al v. Marler*, Case No. 2:20-cv-01914**

Dear Judge Brody:

In the parties' telephone conference with the Court on Friday, September 11, the Government strongly resisted any mass testing for COVID-19 of the detainees in their care, claiming that there is no precedent for ordering testing in these circumstances, that testing would take weeks both to administer and to provide results (rendering it pointless), and that the cost of testing is exorbitant. Petitioners write to debunk each of these assertions and to suggest ways forward.

Although regional infection rates have generally declined in recent weeks, the concern of an outbreak within the FDC remains very much alive. Just today, a detainee in the quarantine unit for new arrivals tested positive, after having tested negative on arrival. Doc. 96. That detainee likely acquired COVID-19 while inside the facility.

Prisons and jails around the country have conducted mass testing of prisoners either pursuant to a court order or on their own volition out of concern for the health and safety of prisoners, staff, and the surrounding community. For starters, this Court has authority to order testing even of staff, not just of prisoners. *See, e.g., Plata v. Newsom*, No. 4:01-cv-1351 (N.D. Cal.), Docs. 3353 (ordering mandatory testing of all staff at one facility within four business days, and production of a “comprehensive plan for testing staff at all prisons in the California Department of Corrections and Rehabilitation”); 3366 (ordering defendants to show cause for Court not to order additional staff testing); 3369 (putting off additional order on mandatory staff testing because of voluntary compliance, and requiring update about baseline testing for “all staff at all institutions” at future status conference);<sup>1</sup> *see also N.C. State Conference of the NAACP, et al. v. Cooper*, No. 20-cvs-500110, (N.C. Sup. Ct. June 16, 2020) (ordering testing). Other courts have declined to order it because governments have voluntarily instituted it.<sup>2</sup>

Closer to home, local prisons have undertaken COVID-19 testing on this scale and larger. For example, the New Jersey Department of Corrections (NJDOC), in partnership with Rutgers University Correctional Healthcare and Accurate Diagnostics Lab, engages in universal testing of its 6,000 staff, and 18,000 prisoners and detainees to control the spread of COVID-19. The plan utilizes the FDA-approved Rutgers saliva test.<sup>3</sup> And the result speaks for itself as NJDOC facilities have seen a significant drop in COVID-19

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<sup>1</sup> The parties are currently litigating modifications to staff testing, *see id.* Doc. 3402 (motion to modify staff testing plan); Doc. 3413 (opposition); Doc. 3434 (opposition based on updated staff testing plan); Doc. 3436 at pg. 19-20 (joint status report setting out updated positions).

<sup>2</sup> *See, e.g.,* Emergency Order 333.2253, requiring mandatory testing for prison staff in all facilities operated by the Michigan Department of Corrections, *available at*: [https://www.michigan.gov/documents/coronavirus/MDHHS\\_Public\\_Health\\_Order\\_-\\_Prison\\_staff\\_testing\\_200819-04\\_699806\\_7.pdf](https://www.michigan.gov/documents/coronavirus/MDHHS_Public_Health_Order_-_Prison_staff_testing_200819-04_699806_7.pdf); *see also* Seth Klamann, Corrections Department ‘encouraged’ by latest round of virus testing that identified 5 new inmate cases, *Casper Star Tribune*, Aug. 27, 2020, [https://trib.com/news/state-and-regional/health/corrections-department-encouraged-by-latest-round-of-virus-testing-that-identified-5-new-inmate-cases/article\\_772097a0-e1eb-5d13-91b1-86c5f7955fd4.html](https://trib.com/news/state-and-regional/health/corrections-department-encouraged-by-latest-round-of-virus-testing-that-identified-5-new-inmate-cases/article_772097a0-e1eb-5d13-91b1-86c5f7955fd4.html) (discussing comprehensive testing of both prisoners and staff).

<sup>3</sup> <https://nj.gov/governor/news/news/562020/approved/20200501a.shtml>

cases from approximately 800 active inmate cases at the peak of the pandemic.<sup>4</sup>

Likewise, the Philadelphia Department of Prisons tested their entire prison population—all 3,855 prisoners. The testing period at each of their facilities ran from May 19 until around June 3-5. The testing was performed by Corizon with test results available after 48 hours. Full results showed that 6 percent of the population was positive for COVID-19.<sup>5</sup> And in April, Montgomery County tested all 948 prisoners in their custody along with staff in a 48-hour period, uncovering an infection rate of approximately 18 percent.<sup>6</sup>

In fact, numerous prisons and jails around the country have managed to undertake at least one-time mass-testing of prisoners. For example, prisons in Connecticut, North Carolina, Massachusetts, and Tennessee have completed one or more rounds of large-scale testing.<sup>7</sup> The Missouri Department of Corrections not only conducted one-time mass testing of its 26,965 prisoners as well as staff, but now conducts continued surveillance-testing of a random 10% of the population of each of its facilities.<sup>8</sup> If all of these state and local facilities can figure out how to efficiently and cost-effectively test their populations, then certainly the Federal Detention Center can, too.

Moreover, the CDC acknowledges the importance of testing in prisons. In a report issued on August 21, 2020 the CDC reviewed mass testing in 16

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<sup>4</sup> <https://www.state.nj.us/corrections/pages/COVID19Updates.shtml>

<sup>5</sup> [https://www.phila.gov/2020-06-05-philadelphia-department-of-prisons-announces-plans-to-enter-yellow-phase/?mc\\_cid=4e8d8b5f4a&mc\\_eid=%5bUNIQID%5d](https://www.phila.gov/2020-06-05-philadelphia-department-of-prisons-announces-plans-to-enter-yellow-phase/?mc_cid=4e8d8b5f4a&mc_eid=%5bUNIQID%5d)

<sup>6</sup> <https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html>

<sup>7</sup> <https://portal.ct.gov/-/media/DOC/Pdf/Coronavirus-3-20/PRESS-RELEASE-re-First-Round-Testing-Results-062920.pdf> (June 29, 2020); <https://www.ncdps.gov/news/press-releases/2020/08/06/mass-covid-19-testing-all-offenders-state-prison-completed> (Aug. 6, 2020); <https://www.mass.gov/news/doc-meets-universal-covid-19-testing-goal> (June 4, 2020); <https://www.tn.gov/correction/news/2020/8/31/covid-19-test-results.html> (Aug. 31, 2020).

<sup>8</sup> <https://doc.mo.gov/media-center/newsroom/covid-19/data>.

prisons and jails and concluded that “[i]n correctional and detention facilities, broad-based SARS-CoV-2 testing provides a more accurate assessment of disease prevalence than does symptom-based testing and generates data that can potentially help control transmission.”<sup>9</sup>

Contrary to the Government’s assertions, universal-testing regimens are available that are effective, efficient, and affordable. Many of the prison departments cited above that have conducted or are conducting massive testing, including Philadelphia and Montgomery County, are using nasal (or nasopharyngeal) swab testing. And recently, the Food and Drug Administration (FDA) approved five saliva tests that research indicates may perform as well as nasal swab testing.<sup>10</sup> Developed by researchers at Yale University, the new saliva test performs at least as well as nasal swab testing and is faster, simpler, and less expensive than nasal swab testing for screening on a massive scale.<sup>11</sup>

Colleges and universities as well as professional sports leagues are also conducting universal and continuous testing. For example, the University of Illinois now is using saliva testing on about 60,000 people twice a week, using this screening as part of its efforts to stay open amid the pandemic, with test results being reported in three to six hours.<sup>12</sup> And coaches, staff,

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<sup>9</sup> <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm>

<sup>10</sup> <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-emergency-use-authorization-yale-school-public-health#:~:text=Today%2C%20the%20U.S.%20Food%20and,testing%20for%20COVID%2D19%20infection.he>

<sup>11</sup> See <https://www.nejm.org/doi/full/10.1056/NEJMc2016359>; <https://medicine.wustl.edu/news/washington-university-develops-covid-19-saliva-test/>

<sup>12</sup> See, e.g. <https://www.npr.org/sections/health-shots/2020/08/15/902616040/can-testing-students-for-coronavirus-twice-a-week-prevent-campus-outbreaks>; <https://www.webmd.com/lung/news/20200904/study-backs-use-of-saliva-covid-test#2>; <https://www.medrxiv.org/content/10.1101/2020.08.03.20167791v1.full.pdf> (“When comparing paired nasopharyngeal swabs and saliva specimens using the authorized ThermoFisher Scientific TaqPath COVID-19 combo kit and our SalivaDirect protocol, we found high agreement in testing outcomes (>94%). Being flexible and inexpensive (\$1.29-\$4.37/sample), SalivaDirect is a viable and accessible option to help alleviate SARS-CoV-2 testing demands.”); <https://jcm.asm.org/content/jcm/58/9/e01438-20.full.pdf>;

and players from the National Basketball Association and the National Basketball Players Association began voluntarily using saliva testing in June, and their participation was central in gaining FDA Emergency Use Authorization.<sup>13</sup> In short, the FDC need not reinvent the wheel, as there are many corrections experts as well as other organizations with whom the FDC could consult on how to test efficiently and effectively.

Comprehensive testing of detainees and prisoners will reveal whether the FDC's efforts to suppress COVID-19 have actually been successful. But in addition—or as an alternative—regular spot-testing of staff and other non-detainees who enter the building would be a vital tool for monitoring and preventing COVID-19 within the FDC.

Numerous other jurisdictions have implemented comprehensive testing of correctional staff.<sup>14</sup> But while the FDC conducts daily screening for staff entering the building, which consists of temperature checks and voluntary reporting of possible symptoms, it has no mechanism to address asymptomatic positive staff and neither tests staff members nor requires them to get outside testing even when knowingly exposed.<sup>15</sup> The FDC has long taken measures to prevent staff from bringing other dangerous items

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[https://www.journalofinfection.com/article/S0163-4453\(20\)30213-9/fulltext](https://www.journalofinfection.com/article/S0163-4453(20)30213-9/fulltext) ("Saliva is a reliable tool to detect SARS-CoV-2.").

<sup>13</sup> See <https://www.the-scientist.com/news-opinion/fda-approves-new-saliva-based-covid-19-test-67829>; [https://www.espn.com/nba/story/\\_/id/29667299/fda-allowing-saliva-based-test-funded-nba](https://www.espn.com/nba/story/_/id/29667299/fda-allowing-saliva-based-test-funded-nba)

<sup>14</sup> E.g., Pamela Wood & Phillip Jackson, *Maryland to Test All Detainees, Staff at Prisons and Juvenile Facilities for Coronavirus*, Baltimore Sun, May 20, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-prison-testing-20200520-wroxapcoljbrvmv7lcs4vrn2e-story.html>; Emily Hamer, *DOC Completes COVID-19 Testing for All Inmates, Staff in Wisconsin Prison System*, Wis. State J., Jul. 21, 2020, [https://madison.com/wsj/news/local/crime-and-courts/doc-completes-covid-19-testing-for-all-inmates-staff-in-wisconsin-prison-system/article\\_9d66ee78-b070-53ce-b1ca-1eb73bfb8dd0.html](https://madison.com/wsj/news/local/crime-and-courts/doc-completes-covid-19-testing-for-all-inmates-staff-in-wisconsin-prison-system/article_9d66ee78-b070-53ce-b1ca-1eb73bfb8dd0.html); Wes Venteicher, *California Correctional Officers, Staff at All Prisons To Be Tested for COVID-19*, Sacramento Bee, June 10, 2020, <https://www.sacbee.com/news/politics-government/the-state-worker/article243427161.html>.

<sup>15</sup> Several staff members have voluntarily disclosed to the FDC that they tested positive at outside sites. E.g., Docs. 32, 36, 41, 73.

into the facility; all FDC staff “must undergo daily electronic searches of their person (via walk-through or handheld metal detector) and their belongings (via x-ray screening).”<sup>16</sup> Just as staff screening is warranted to block the introduction of dangerous contraband such as weapons or narcotics into the FDC, it is warranted to block the (inadvertent) introduction of dangerous “contraband” in the form of infectious particles of SARS-CoV-2.

Indeed, the FDC’s protocols make staff members the most likely pathway for the virus to enter the facility. Over 100 staff members come and go every day without quarantining. By contrast, newly arrived detainees enter a 14-day quarantine period to reduce their chances of spawning an outbreak. And with social visitation canceled and attorney visitation much less common than before March, few people other than detainees and staff enter the FDC.

Infection levels in Philadelphia are, thankfully, significantly lower now than they were in the spring and early summer. Still, as of today the City warns of a “[h]igh risk of community transmission.”<sup>17</sup> And cooler weather may soon contribute to a resurgence of the disease, as Petitioners’ expert Dr. Gonsalves has warned. *See* Doc. 78-1. Spot-testing of staff would help prevent the unfortunate entry of the coronavirus into the FDC.

Respectfully,

/s/ Linda Dale Hoffa  
LINDA DALE HOFFA  
Counsel for Petitioners

cc: All counsel of record by ECF

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<sup>16</sup> *See* U.S. Dep’t of Justice, Office of the Inspector General, *Review of the Federal Bureau of Prisons’ Contraband Interdiction Efforts* (June 2016), at ii n.2, available at <https://oig.justice.gov/reports/2016/e1605.pdf>.

<sup>17</sup> City of Phila., Dep’t of Public Health, *Coronavirus Disease 2019 (COVID-19)*, <https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/>